


# COVID-19 EMERGENCY CONTRACT AWARD EXEMPTION REPORT

This report is for action by the relevant Corporate Director

Section 1: Report Detail			
Report Date:	2 <sup>nd</sup> July 2020	Report Submitted to:	Strategic Commissioning Board
Section 2: Requesters Details			
Council:	Tameside	Directorate:	Commissioning
Submitting Officer:	Elaine Richardson	Service:	Commissioning
Job Title:	Strategic Lead for Ageing Well and Assurance	Telephone:	07855469931
e-mail:	Elaine.richardson@nhs.net	Budget Holder:	Elaine Richardson
Key Decision:	Yes	Budget Code:	613651 52161002
Request Submitted:	Modification of Existing Contract	Applicable Regime:	1. Detailed Financial Policy
Section 3a: Request Detail – If Award of Above Threshold Contract / If Award of below threshold contract under an Exemption			
Contract Detail ( <i>Include a summary of what will be delivered under the contract</i> )	N/A – See Section 3b	Party Detail ( <i>Include name and address of provider/contractor</i> )	N/A – See Section 3b
Contract Start	N/A – See Section 3b	Contract End	N/A – See Section 3b
Contract Extensions ( <i>Include detail of any extension provisions included in the contract</i> )	N/A – See Section 3b		
Total Contract Value	N/A – See Section 3b		
Any other relevant contract detail	N/A – See Section 3b		
Section 3b: Request Detail – If Modification to Existing Contract			
Contract Detail: ( <i>Include a summary of what is delivered under the contract</i> )	Community Optometry Service:- <ul style="list-style-type: none"> <li>Enhanced Cataract Referral and Post Cataract Follow Up Pathway</li> <li>Repeat Measures Service</li> <li>Minor Eye Conditions Service</li> </ul>		
Contract Detail ( <i>Include name and address of provider/contractor</i> )	Primary Eyecare Services ODS Code: AFW00  Registered Address: 2 Woodbridge Street, London EC1R 0DG  Company Number: 6722353		
Original Agreement Expiration Date	31 <sup>st</sup> March 2021	New Agreement Expiration Date(if applicable)	31 <sup>st</sup> March 2021
Details of proposed Modification	Enhancement of Minor Eye Conditions Service  COVID-19 Urgent Eyecare Service - CUE		
Original Contract Value (the total potential value of contract at the time of contract award and as advertised in original OJEU advert)			£ MECS accounts for £295,000 a

	year
Current Agreement Value (the current contract spend, including spend pursuant to any previous Modifications approved):	£160,300
<b>Value of the proposed Modification:</b>	<b>£ 10,000</b>
Total Agreement Value (Current Agreement Value + Value of this Modification):	<b>£170,000</b> <b>(based on cost per case and modified until the end of the year)</b>

#### Section 4: Justification

Details as to why this is urgent / an emergency (refer to evidence requirements above – provide supporting argument)	<p>The Covid-19 pandemic is currently placing high levels of strain on Health and Social Care services in Tameside and Glossop. The requirement to protect hospital capacity and reduce the risk of infection means additional patients will need to be managed in the community. The CUES enables a network of optical practices, acting as urgent eye care hubs, to support the immediate and recovery phase of the coronavirus pandemic. It is in line with NHS England's advice on how urgent eye care can safely continue during the pandemic, and the role that primary care optometrists should play in delivering this care.</p> <p>The legal provisions that support this justification are set out below along with reasoning to justify / address compliance with each point: Regulation 72(1) of the Public Contracts Regulations 2015 sets out the following: Contracts ... may be modified without a new procurement procedure ... in any of the following cases: (c) where all of the following conditions are fulfilled: (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen; <b><i>The emergence of COVID-19 and the effects, in particular the effect on this contract, could not have been foreseen by the authority. It is due to a mandate from NHS England in response to COVID-19 that has resulted in the modification to contract being required.</i></b> (ii) the modification does not alter the overall nature of the contract; <b><i>The overall nature of the contract remains unchanged as the additional requirement is of an extremely similar nature to the original scope.</i></b> (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement. <b><i>The value of the modification is £10k, this is significantly below the 50% cap, sitting at only 3.38% of the original contract value. The contract is paid on a cost per case basis and this temporary increase for the enhancement does not exceed 50% of the total agreed financial framework.</i></b></p> <p>The justification provided above demonstrates that the decision to modify this contract is related to the COVID-19 outbreak and details the specific facts.</p>
Action taken by the Corporate Director / Corporate Director's comments	Scrutiny and assurance has been provided by Strategic Commissioning Group, Board and the Strategic Commissioning Board

#### Section 5: Submission Signatories

Relevant Corporate Director	Finance SRO	Legal SRO
Signed:		
Name:	Jessica Williams	

Date:			
<b>If Tameside Council: Relevant Portfolio Holder</b>			
Signed:			
Name (and remit):			
Date:			

Notes:

If you have an urgent requirement for goods, services or works due to COVID-19, and you need to procure this under the Public Contract Regulations 2015 (PCRs) and/or Contract Procedure Rules, there are various options available.

These include:

- direct award due to extreme urgency;
- direct award due to absence of competition or protection of exclusive rights;
- call off from an existing framework agreement or dynamic purchasing system;
- call for competition using a standard procedure with accelerated timescales;
- extending or modifying a contract during its term.

In respect of contract awards, depending on the specific nature of your requirement there may be further options under the PCRs, such as the additional delivery of supplies from an existing supplier (regulation 32(5)), additional similar works or services from an existing supplier (regulation 32(9)), or using the services of a subsidiary of another contracting authority (regulation 12). We could look to reduce the minimum timescales for the open procedure, the restricted procedure and the competitive procedure with negotiation if a state of urgency renders the standard timescales impracticable. We could also consider the use of the Light Touch Regime for specific health and social care related services (see regulation 74-77). You should seek advice from STAR Procurement in respect of these options.

In accordance with the Council's Contract Procedure Rules, The Public Procurement Regulations and Cabinet Office Procurement Policy Notes responding to the COVID-19 outbreak, this form must be completed in the following circumstances:

- Where there is an intention to award a contract without seeking competition, where the contract value is below the relevant OJEU threshold, for reasons of: extreme urgency; to comply with legislative requirements; or due to absence of competition or protection of exclusive rights, which are linked to Covid19 circumstances; or
- Where there is an intention to award a contract without seeking competition, where the contract value exceeds the relevant OJEU threshold, for reasons of: extreme urgency; to comply with legislative requirements; or due to absence of competition or protection of exclusive rights, which are linked to Covid19 circumstances; or
- Where there is an intention to modify an existing contract (where the contract value is either above or below the relevant OJEU threshold) during its term for reasons of extreme urgency or to comply with legislative requirement linked to Covid19 circumstances.

For all other non-emergency contract awards and modifications (either above threshold or below thresholds) the CPRs should be adhered to and usual processes followed.

Please note, in making an award of contract or modifying a contract and in completing this report:

- You should limit your requirements to only what is absolutely necessary both in terms of what you are procuring and the length of contract;
- Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the contracting authority;
- It is important that contracting authorities continue to achieve value for money and use good commercial judgement during any direct award and this should be demonstrated in the report;
- The table below further sets out the written evidence which must be recorded within this report to demonstrate justification which satisfies all relevant tests.

Where there is an intention to award a contract without seeking competition, where the contract is below the relevant OJEU threshold, for reasons of extreme urgency or to comply with legislative requirement linked to Covid19 circumstances:	
The Grounds for award of contract:	The Evidence to be recorded in this report:
<ul style="list-style-type: none"> <li>• To comply with legal requirements;</li> <li>• The contract is for supplies, services or execution of works which are required in circumstances of extreme urgency and unforeseeable emergency involving risks to person, property or serious disruption to Council services;</li> <li>• Any other exceptional circumstances.</li> </ul>	<p>In responding to COVID-19, you must be able to demonstrate in the report that the following tests have all been met:</p> <ol style="list-style-type: none"> <li>1) There are legal requirements which require the Local Authority to take measures in order to comply with those legal requirements; and/or</li> <li>2) There are genuine reasons for extreme urgency, eg: <ul style="list-style-type: none"> <li>◦ you need to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc;</li> <li>◦ you are reacting to a current situation that is a genuine emergency - not planning for one; and/or</li> </ul> </li> <li>3) The events that have led to the need for extreme urgency were unforeseeable, eg: <ul style="list-style-type: none"> <li>◦ the COVID-19 situation is so novel that the consequences are not something you should have predicted; and/or</li> </ul> </li> <li>4) It is impossible to comply with the usual requirements in the CPRs: <ul style="list-style-type: none"> <li>◦ there is no time to seek quotations;</li> <li>◦ there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system; and/or</li> </ul> </li> <li>5) The situation is not attributable to the contracting authority, eg: <ul style="list-style-type: none"> <li>◦ the authority has not done anything to cause or contribute to the need for extreme urgency</li> </ul> </li> </ol>

**Where there is an intention to award a contract without seeking competition, where the contract value exceeds the relevant OJEU threshold, for reasons of extreme urgency or to comply with legislative requirement linked to Covid19 circumstances**

The Grounds for award of contract:	The Evidence to be recorded in this report:
<p>• <b>Direct award due to extreme urgency</b> (regulation 32(2)(c));  <i>The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: ...</i>  <i>(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.</i></p> <p>... the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.</p> <p>• <b>Direct award due to absence of competition or protection of exclusive rights (regulation 32(2)(b));</b>  <i>The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: ...</i>  <i>(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: ...</i></p>	<p>In responding to COVID-19, you must be able to demonstrate the following tests have all been met:</p> <ol style="list-style-type: none"> <li>1) There are genuine reasons for extreme urgency, eg: <ul style="list-style-type: none"> <li>○ you need to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc;</li> <li>○ you are reacting to a current situation that is a genuine emergency - not planning for one.</li> </ul> </li> <li>2) The events that have led to the need for extreme urgency were unforeseeable, eg: <ul style="list-style-type: none"> <li>○ the COVID-19 situation is so novel that the consequences are not something you should have predicted.</li> </ul> </li> <li>3) It is impossible to comply with the usual timescales in the PCRs, eg: <ul style="list-style-type: none"> <li>○ there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;</li> <li>○ there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.</li> </ul> </li> <li>4) The situation is not attributable to the contracting authority, eg: <ul style="list-style-type: none"> <li>○ you have not done anything to cause or contribute to the need for extreme urgency</li> </ul> </li> </ol> <p>Therefore, a contracting authority may make a direct award where the works, goods or services needed to respond to COVID-19 can only be supplied by a particular supplier because:</p> <ul style="list-style-type: none"> <li>• competition is absent for technical reasons eg there is only one</li> </ul>

<p>(ii) competition is absent for technical reasons,</p> <p>(iii) the protection of exclusive rights, including intellectual property rights,</p> <p>... but only where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.</p>	<p>supplier with the expertise to do the work, produce the product or with capacity to complete on the scale required; or</p> <ul style="list-style-type: none"> <li>the protection of exclusive rights, including intellectual property rights eg: <ul style="list-style-type: none"> <li>the supplier owns those rights (including intellectual property rights);</li> <li>it has the exclusive right to exploit intellectual property rights.</li> </ul> </li> </ul> <p>You should also demonstrate that:</p> <ul style="list-style-type: none"> <li>there is no reasonable alternative or substitute available; and</li> <li>the contracting authority is not doing something which artificially narrows down the scope of the procurement eg by over-specifying the requirement</li> </ul>
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Where there is an intention to modify an existing contract (where the contract value is either above or below the relevant OJEU threshold) during its term for reasons of extreme urgency or to comply with legislative requirement linked to Covid19 circumstances.	
The Grounds for modification of contract:	The Evidence to be recorded in this report:
<p>Regulation 72(1) sets out the following:  <i>Contracts ... may be modified without a new procurement procedure ... in any of the following cases:</i></p> <p>(c) where all of the following conditions are fulfilled:</p> <ul style="list-style-type: none"> <li>(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;</li> <li>(ii) the modification does not alter the overall nature of the contract;</li> <li>(iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.</li> </ul> <p><i>There are other grounds available under regulation 72 for extending contracts, including: if the proposed variation has been specifically</i></p>	<p>You must record the justification that satisfies these conditions, including limiting any extension or other modification to what is absolutely necessary to address the unforeseeable circumstance.</p> <p>This justification should demonstrate that your decision to extend or modify the particular contract(s) was related to the COVID-19 outbreak with reference to specific facts, eg your staff are diverted by procuring urgent requirements to deal with COVID-19 consequences, or your staff are off sick so they cannot complete a new procurement exercise.</p> <p>The modification will need to be published in an OJEU notice to say you have relied on regulation 72(1)(c).</p> <p>Multiple modifications are permissible, however each one should not exceed the 50% of the original contract value. You should also consider limiting the duration and/or scope of the modification and running a procurement for longer-term/wider scope requirements alongside it.</p> <p>If more than one ground is applicable this may</p>

<i>provided for in the contract (regulation 72(1)(a)); where a change of contractor cannot be made for economic or technical reasons (regulation 72(1)(b)), and where the modifications are not substantial (regulation 72(1)(e))</i>	lower the legal risk and therefore you should ensure all relevant grounds are included in your written justification. You should seek advice from STAR if there is more than one ground available.
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